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No. 09-1131

IN THE

Supreme Court of the United States

DOUG MORGAN, ET AL.,
Petitioners,

v.

PLANO INDEPENDENT SCHOOL DISTRICT, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT PLANO INDEPENDENT SCHOOL DISTRICT

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QUESTION PRESENTED

Whether the Fifth Circuit properly upheld, as facially constitutional under long-established First Amendment precedent, a school district's content- and viewpoint-neutral policy that creates reasonable time, place, and manner restrictions on distribution of noncurricular materials during instructional time but expressly permits students to distribute any constitutionally protected written materials they desire at many opportunities before, during, and after the school day.

TABLE OF CONTENTS

Page

Question Presented i

Table of Authorities iii

Opinions Below 4

Statement of the Case 4

Reasons for Denying the Petition 13

I. There Is No Conflict Among the Circuits About Evaluating Time, Place, and Manner Regulations in Schools 14

A. This Case Does Not Involve a Direct Prohibition on Speech 14

B. No Circuit Has Applied *Tinker* to Content-Neutral Time, Place, and Manner Regulation of Student Distribution of Materials 20

II. This Case Is a Poor Vehicle for Addressing the Question Presented 24

Conclusion 28

TABLE OF AUTHORITIES

Page(s)

CASES

American Constr. Co. v. *Jacksonville, T. & K. W. R. Co.*,
148 U.S. 372 (1893) 25

Bar-Navon v. *Brevard County Sch. Board*,
290 Fed. Appx. 273 (CA11 2008) 23

Bethel Sch. Dist. No. 403 v. *Fraser*,
478 U.S. 675 (1986) 15

Blau v. *Fort Thomas Pub. Sch. Dist.*,
401 F.3d 381 (CA6 2005) 23

Bhd. of Locomotive Firemen & Enginemen v. *Bangor & Aroostook R.R.*,
389 U.S. 327 (1967) 25

Canady v. *Bossier Parish Sch. Board*,
240 F.3d 437 (CA5 2001) 22, 23

Clark v. *Cmty. for Creative Non-Violence*,
468 U.S. 288 (1984) 17, 19

Cox v. *Louisiana*,
379 U.S. 536 (1965) 16

Gonzales v. *Carhart*,
550 U.S. 124 (2007) 28

Grayned v. *City of Rockford*,
408 U.S. 104 (1972) 17, 18

Greer v. *Spock*,
424 U.S. 828 (1976) 18

Guiles v. *Marineau*,
461 F.3d 320 (CA2 2006) 21, 23

Hague v. *Comm. for Indus. Org.*,
307 U.S. 496 (1939) 17

TABLE OF AUTHORITIES—Continued

Page(s)

Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*,
240 U.S. 251 (1916) 25

Heffron v. *Int'l Soc. for Krishna Consciousness, Inc.*,
452 U.S. 640 (1981) 11, 16, 18

Hill v. *Colorado*,
530 U.S. 703 (2000) 11, 15, 17

Int'l Soc. for Krishna Consciousness, Inc. v. *Lee*,
505 U.S. 672 (1992) 17

Jacobs v. *Clark County Sch. Dist.*,
526 F.3d 419 (CA9 2008) 23

Linmark Associates, Inc. v. *Willingboro*,
431 U.S. 85 (1977) 20

Lowry v. *Watson Chapel Sch. Dist.*,
540 F.3d 752 (CA8 2008) 21

M.A.L. v. *Kinsland*,
543 F.3d 841 (CA6 2008) 22

Morse v. *Frederick*,
551 U.S. 393 (2007) 11, 15

Newsom v. *Albemarle County Sch. Board*,
354 F.3d 249 (CA4 2003) 21, 23

Nuxoll v. *Indian Prairie Sch. Dist. No. 204*,
523 F.3d 668 (CA7 2008) 21, 22

Palmer v. *Waxahachie Indep. Sch. Dist.*,
130 S.Ct. 1055 (2010) 23

Palmer v. *Waxahachie Indep. Sch. Dist.*,
579 F.3d 502 (CA5 2009) 23

TABLE OF AUTHORITIES—Continued

Page(s)

Perry Educ. Assn. v. *Perry Local Educators' Assn.*,
460 U.S. 37 (1983) 17, 18

Porter v. *Ascension Parish Sch. Board*,
393 F.3d 608 (CA5 2004) 22

Renne v. *Geary*,
501 U.S. 312 (1991) 27

Saxe v. *State Coll. Area Sch. Dist.*,
240 F.3d 200 (CA3 2001) 21

S.G. v. *Sayreville Board of Educ.*,
333 F.3d 417 (CA3 2003) 6

Tinker v. *Des Moines Indep. Cmty. Sch. Dist.*,
393 U.S. 503 (1969) 2, 10, 19

United States v. *Kokinda*,
497 U.S. 720 (1990) 17

United States v. *O'Brien*,
391 U.S. 367 (1968) 19

United States v. *Raines*,
362 U.S. 17 (1960) 27

Virginia Military Inst. v. *United States*,
508 U.S. 946 (1993) 25, 26

Walker-Serrano v. *Leonard*,
325 F.3d 412 (CA3 2003) 21, 22

Ward v. *Rock Against Racism*,
491 U.S. 781 (1989) 17

Washington State Grange v. *Washington State Republican Party*,
552 U.S. 442 (2008) 28

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

Fed. Rule Civ. Proc. 54(b).....26

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BRIEF IN OPPOSITION FOR RESPONDENT PLANO INDEPENDENT SCHOOL DISTRICT

No court of appeals has ever held that the U.S. Constitution grants children in school a virtually unfettered right to distribute personal materials in classrooms during instructional time. And this Court's precedents do not remotely suggest the kind of unbalanced and unwise approach to the First Amendment in schools that petitioners espouse. There is simply no conflict among federal courts over the real issues in this case—properly understood—or merit to petitioners' arguments that schoolchildren in school enjoy more expansive First Amendment rights than adults in public forums.

Public schools are charged by their respective States with equipping the next generation to participate as citizens. Education is the core of that challenging mission, but it includes permitting opportunities for children to exercise their constitutional right to free expression. Schools must—and do—strike a careful balance between permitting pupils to express themselves and preserving critical time for meeting instructional goals. No school could strike that balance if, as petitioners urge, the Constitution dictated that they permit every expressive interruption of the instructional process that does not clear the high threshold of substantial and material disruption.

No precedent of this Court, or any circuit court, requires schools to operate under such a disability. It is well established that adults in traditional public forums have expansive rights to freely express their ideas and opinions but may nevertheless be constitutionally subject to reasonable regulation of when, where, and how they can exercise that right. *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969), in which the Court limited schools' ability to engage in viewpoint discrimination, does not displace that general First Amendment jurisprudence in schools; it is not and cannot be the case that time, place, and manner regulations applied to schoolchildren are subject to greater scrutiny than those applied to adults in public streets and parks.

Petitioners' problem is not so much that they misread *Tinker*—although they do—but that they misconstrue the nature of this case and of those in which *Tinker* properly applies. The issue that the Fifth Circuit decided and that petitioners attempt to

place before the Court is whether respondent Plano Independent School District's current policy on student distribution of noncurricular materials is facially constitutional. That policy simply does not prohibit *any* content, except that falling within narrowly defined categories of speech like obscenity that are not protected in grade schools. Plano ISD's policy does not prohibit religious speech, notwithstanding the tenor of petitioners' as-applied claims, which are not before the Court but which the petition repeatedly conflates with petitioners' facial challenge. The policy at issue does not regulate the content of speech; it plainly regulates only when, where, and how students may engage in some forms of speech—and it permits them many opportunities to do so. Yet petitioners continually mischaracterize the policy as a prohibition of speech. And every case they cite as a purported example of the correct application of *Tinker* actually involved a prohibition of particular speech, not a time, place, and manner regulation like that at issue in this case.

There is simply no conflict among the federal circuits or between the Fifth Circuit's opinion in this case and the Court's precedent. Petitioners identify no case that applied *Tinker* to a school's content- and viewpoint-neutral policy that *permits* all manner of protected speech, like the policy at issue in this case. Petitioners' inability to discuss their facial challenge without referring to their still unlitigated as-applied claims alleging prohibitions of particular speech further illustrates why this case would not be an appropriate vehicle to clarify any questions that might exist over the scope of *Tinker*. Petitioners' as-applied claims are hotly disputed and have not been adjudicated by any court.

In short, this case presents no genuine issue on which there is any confusion or conflict among the lower courts. The only circuits to consider the constitutionality of content-neutral time, place, and manner regulations in a school materials-distribution policy—petitioners identify only one other than the Fifth Circuit—performed the same analysis and reached the same conclusion. The petition should be denied.

OPINIONS BELOW

The opinion of the Fifth Circuit, Pet. App. 1, is reported at 589 F.3d 740. The Fifth Circuit's order denying rehearing and rehearing en banc is reprinted at Pet. App. 15. The district court's decision denying plaintiffs' motion for summary judgment on the facial constitutionality of the 2005 policy, granting in part Plano ISD's motion for summary judgment on the 2005 policy, and finding moot the 2004 policy's constitutionality, is reprinted at Pet. App. 17 and may be found at 2007 WL 654308. The unreported magistrate's report and recommendation is reprinted at Pet. App. 24. The district court's opinion and order denying the motion of two of the individual defendants for dismissal on qualified immunity grounds is reported at 612 F.Supp.2d 750. The appeal of that order is pending in the Fifth Circuit. *Morgan* v. *Swanson*, No. 09-40373 (CA5, oral argument heard Apr. 7, 2010).

STATEMENT OF THE CASE

Petitioners' appeal involved a challenge to the facial constitutionality of Plano ISD's 2005 policy on student distribution of noncurricular materials. Petitioners' claims regarding the facial constitutionality of a similar previous version of the policy, the 2004 policy, have not been addressed on

the merits by either the district court or the Fifth Circuit. Those claims currently remain before the district court. Similarly, petitioners' other claims, including their as-applied challenges relating to the application of the Plano ISD student-distribution policy, are not before the Court. Those claims are also still pending in the district court. Accordingly, petitioners' unsubstantiated allegations concerning the motivation for or the application of the distribution policies to particular students in particular circumstances have never been tested by a fact finder or adjudicated.[1]

The 2005 student-distribution policy does a great deal to facilitate student expression, and it does not prohibit any constitutionally protected expression, let alone on the basis of its content or viewpoint. See Pet. App. 98-105. The policy generally permits all students to distribute materials 30 minutes before or after school hours, at any school entrance or exit. *Ibid.* It permits students to leave materials on a distribution table or in other designated areas, and it instructs school principals to provide such an area for that purpose. *Ibid.* The policy also allows high school and middle school students to distribute materials during noninstructional time in school hallways and cafeterias, and it permits elementary school children to distribute materials during recess and at three designated school parties. *Ibid.* In sum, the only restriction on middle- and high-school-student distribution is that those students may not

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[1] Petitioners also lodged claims against several individual defendants. Whether some of those individuals are entitled to qualified immunity is the subject of yet another appeal, which is currently pending in the Fifth Circuit. See *Morgan* v. *Swanson*, No. 09-40373 (CA5, oral argument heard Apr. 7, 2010).

distribute noncurricular materials "in the classroom during school hours." Pet. App. 99. Elementary school children are additionally restricted from distributing noncurricular materials in the cafeteria during designated lunch periods, which are considered instructional time, and in school hallways, which are primarily for safe movement between classrooms. *Id.*, at 99-100.

The policy draws no distinctions based on content or viewpoint expressed, and petitioners have acknowledged that the policy is facially content neutral. See, *e.g.*, Pet. 14 (framing the case as involving the standard applicable to "content- and viewpoint-neutral restrictions on student speech"). The policy does not *prohibit* or *ban*[2] *any* protected speech.[3] The few, narrow prohibitions on student

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[2] Petitioners' inaccurate rhetoric accuses Plano ISD's policy of outright banning or prohibiting student speech or distribution. See, *e.g.*, Pet. 4, 6-8, 33. Those assertions conflate petitioners' as-applied claims, based on alleged discrete incidents in which students were purportedly prohibited from distributing particular materials, with the facial challenge that is the only claim before the Court. Petitioners discuss those allegations, citing their own pleadings, as though they were established fact. But defendants vigorously dispute the alleged instances of prohibited speech, and no fact discovery as to those allegations has yet taken place, much less have those claims been adjudicated.

[3] Some courts and commentators have questioned whether elementary-school children enjoy the same First Amendment rights while at school as older students. See, *e.g.*, *S.G.* v. *Sayreville Board of Educ.*, 333 F.3d 417, 423 (CA3 2003). Regardless, Plano ISD's 2005 materials-distribution policy affords young children as much or more protection than the First Amendment demands, permitting them the same freedom to distribute constitutionally protected materials it permits to older students.

speech in the policy relate to types or categories of speech, like obscenity, recognized as falling outside the First Amendment's protection in grade schools.[4] Petitioners do not challenge, and have never challenged, those aspects of the policy.

Plano ISD adopted the 2005 policy on April 4, 2005, following a public meeting. The district adopted the policy only after receiving evidence that student distribution of materials like birthday cards, notes, and concert tickets was significantly and negatively affecting the learning environment. See R.1520-1523; see also R.2049-2051, 2053-2055. Nonetheless, a main goal of the 2005 policy is to "allow greater distribution by students and others of all materials, including religious materials by all faiths . . . [and to] create more opportunities for students to exchange materials while remaining non-disruptive to the educational process." R.1459-1460 (Plano ISD Superintendent Doug Otto). Once adopted, the 2005 policy superseded the 2004 policy, which is no longer in effect.

The district's board re-adopted the 2005 policy in November 2005, following a public hearing at which

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[4] The Fifth Circuit summarized this aspect of the policy as follows:

> "The Policy bans materials that (1) are obscene, vulgar, or otherwise age-inappropriate; (2) endorse actions endangering the health or safety of students; (3) advocate violation of school rules; (4) advocate imminent lawlessness; (5) contain hate speech; and (6) reasonably could result in 'material and substantial interference with any school education and/or curricular related activity or that blocks or impedes the safe flow of traffic within hallways and entrance or exit ways of the school.'" Pet. App. 2-3, n.2.

eleven Plano ISD educators testified about the need for the policy to safeguard the district's core educational mission. Pet. App. 3. At that hearing, the district also received a detailed report from school principal Susan Dantzler as well as various legal authorities. The materials considered by the board at the hearing, and the transcript of the November 2005 hearing, were included in the record in the lower courts. R.1988-2255.

Following the hearing, and in connection with its November 2005 re-adoption of the 2005 policy, the district added a preamble to the 2005 policy. The preamble expresses the district's objectives of protecting the integrity of the educational environment and, at the same time, remaining respectful of students' legitimate desire to communicate on nonschool topics:

> "[T]he Board of Trustees finds the provisions of [the 2005 policy] are intended to decrease distractions, to decrease disruption, to increase the time available and dedicated to learning, and to improve the educational process, environment, safety and order at District schools and not invade or collide with the rights of others. . . .
>
> [T]he Board of Trustees finds that, from an educational perspective, the distribution of non-school materials during times and places when the District is attempting to teach students is both distracting and a material and substantial disruption to the educational process and environment and to the order and discipline of the schools . . . ." Pet. App. 106-108; R.2544-2545.

Petitioners, a group of four families whose children attended Plano ISD schools, filed this

lawsuit asserting a variety of claims, including facial and as-applied challenges to the 2004 and 2005 policies, and naming Plano ISD and six school employees as individual defendants. The case was split into several pieces in the district court. The issue of qualified immunity was separated from the rest of the case. The other claims, including the as-applied challenges, were held in abeyance while the district court addressed only the policies' facial constitutionality. On that issue, respondents and Plano ISD filed crossmotions for summary judgment. Petitioners' motion acknowledged that it did "not seek summary judgment on the *application*" of the policies, but rather sought only a judgment "declaring the 2004 and 2005 versions of [the policies] facially invalid under the law." R.908 (emphasis in original).

The district court referred the facial challenges to a magistrate judge, who recommended denial of petitioners' summary judgment motion and grant of Plano ISD's crossmotion. R.2816-2843. The magistrate judge recognized that the 2005 policy "was narrowly tailored to achieve the significant governmental interest of 'improving the educational process,' while leaving open ample channels of communication." Pet. App. 4 (footnote omitted); see Pet. App. 24-59; see also R.2835-2836. The district court adopted the magistrate's recommendation in all aspects but one. Pet. App. 17-20. The district court held the 2005 policy constitutional on its face, except for its restriction on elementary-student distribution of materials in the cafeteria during designated meal periods, which the court found unconstitutionally overbroad. Pet. App. 19-20. Adopting the magistrate's recommendation, the district court ruled that the facial validity of the 2004 policy was a moot issue, given the lack of evidence suggesting the district

might, for some reason, revert back to that prior policy. Pet. App. 19; see Pet. App. 4. The district court, therefore, did not address the merits of petitioners' facial challenge to the 2004 policy, petitioners' as-applied challenges, or the issue of the school officials' qualified immunity.

The district court certified as final and appealable its order on the facial constitutionality of the 2004 and 2005 policies. Pet. App. 21. The Fifth Circuit found that the 2005 policy is facially constitutional in all respects, including as it relates to elementary-school-student distribution in cafeterias. The Fifth Circuit reversed the district court's finding that the constitutionality of the 2004 policy is a moot issue and remanded that aspect of the case to the district court for consideration on the merits. That issue is still pending in the district court.

The Fifth Circuit's opinion, authored by Judge Higginbotham, recognized that *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969), is about "content or viewpoint based restrictions" of student speech and that "time, place, and manner is the proper standard for evaluating content and viewpoint neutral regulations of student speech." Pet. App. 6 (internal quotation marks omitted). The opinion noted that it is constitutionally permissible to adopt "content and viewpoint neutral" regulations of student speech that are "narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication of the information." Pet. App. 7-8 (internal quotation marks and ellipses omitted).

The Fifth Circuit addressed, and dismissed as unconvincing, petitioners' assertion that the law on reasonable time, place, and manner regulations only

applies to regulations addressing expressive conduct and that regulations affecting "pure speech" in the school setting must always be evaluated under the *Tinker* standard. The Fifth Circuit noted that this Court has at least twice upheld reasonable time, place, and manner regulations affecting leafleting or distribution of written materials, on one occasion at a state fair and on another occasion on a public street or sidewalk. Pet. App. 8 (citing *Heffron* v. *Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-648 (1981), and *Hill* v. *Colorado*, 530 U.S. 703, 725-726 (2000)). The court also recognized a serious inconsistency inherent in petitioners' argument, under which time, place, and manner regulations of "pure speech" are permitted in "quintessential public forums" like public streets and sidewalks, while, at the same time, regulations of student distributions at schools "requir[e] the state to clear the higher burden of a substantial disruption" standard. Pet. App. 9 (internal quotation marks omitted).

The court also addressed petitioners' argument, repeated in its petition to this Court, that *Morse* v. *Frederick*, 551 U.S. 393 (2007), and Justice Alito's concurring opinion in that case require application of *Tinker* to all school-speech regulations. Pet. App. 9. *Morse*, the Fifth Circuit noted, did not involve a content- or viewpoint-neutral regulation, and Justice Alito's concurrence, moreover, implicitly recognized that "the generally applicable free speech rules (such as the allowance of time, place, and manner restrictions) continue to apply." Pet. App. 10.

Applying the appropriate standard for time, place, and manner regulations, the Fifth Circuit found that all aspects of the 2005 policy survived constitutional scrutiny. Pet. App. 10-11. The court

recognized that the regulations are content neutral, further a significant legitimate governmental interest the existence of which is supported by more than adequate evidence, and provide ample alternative channels of communication. *Id.*, at 10-12. The court also concluded that the policy is sufficiently narrowly tailored. *Id.*, at 11. As for the aspect of the policy regulating distributions in the cafeteria during elementary-school lunch periods, the court noted "elementary school lunchrooms are heavily controlled yet near chaotic places where school administrators struggle to ensure that young students are able to take lunch in a limited period of time, and that elementary school students are not as mature and require more guidance than older students" during these periods. *Id.*, at 12. Moreover, elementary students have "several opportunities to distribute materials throughout the day," including "after school as well as at recess." *Id.*, at 12-13. Accordingly, the Fifth Circuit reversed the district court's overbreadth finding on the regulations for elementary-school-student distributions in cafeterias.

Finally, the Fifth Circuit addressed the district court's finding that the constitutionality of the 2004 policy was a moot issue, given the evidence that Plano ISD has no intention of reverting to that policy. Pet. App. 13-14. Citing petitioners' claims for nominal damages, the court concluded that the constitutionality of the 2004 policy was not moot and should be considered on the merits in the district court. *Ibid.* The court, therefore, remanded that portion of the case to the district court, which has yet to rule on it. *Id.*, at 14.

REASONS FOR DENYING THE PETITION

Contrary to petitioners' rhetoric, this case does not involve a prohibition of speech. Under Plano ISD's policy, students are allowed to distribute materials containing any constitutionally protected content—including religious content—at various times and places. There is no conflict or confusion among the courts of appeals. No court of appeals has applied *Tinker* to invalidate a policy like Plano ISD's. And every one of the *Tinker* cases petitioners cite involved a prohibition of particular speech, not a time, place, and manner regulation.

The Fifth Circuit upheld Plano ISD's time, place, and manner regulation under long-settled First Amendment jurisprudence. It correctly recognized that neither *Tinker* nor any other precedent of this Court requires public schools to become expressive free-for-alls in which students have a nearly limitless right to interrupt instructional time to express their personal views.

This case just does not present the issue petitioners seek to have the Court opine on. And even if it did, its interlocutory posture would make the Court's review especially inappropriate. Because petitioners' facial challenge was certified for separate appeal, petitioners' as-applied claims have never been adjudicated and will be vigorously contested; but regardless, no record has been developed as to the prohibitions of particular speech alleged in those claims. The Court has long preferred to resolve constitutional challenges in the context of concrete, as-applied claims, and for good reason. The as-applied issues in this case are nowhere near ripe for review.

The Court should deny the petition. The Fifth Circuit's resolution of petitioners' facial challenge breaks no new constitutional ground and creates no conflict in the law. And this partially adjudicated, still pending, case would be an inappropriate vehicle in any event.

I. THERE IS NO CONFLICT AMONG THE CIRCUITS ABOUT EVALUATING TIME, PLACE, AND MANNER REGULATIONS IN SCHOOLS.

A. This Case Does Not Involve a Direct Prohibition on Speech.

Despite conceding at oral argument in the Fifth Circuit and in their petition that Plano ISD's 2005 policy is a content- and viewpoint-neutral regulation of when, where, and how certain student speech may occur, petitioners persist in mischaracterizing the policy as one that prohibits speech. Far from "prohibit[ing] virtually all non-verbal [*sic*] student speech in any school-related context,"[5] Pet. 4, the 2005 policy is all about how certain protected speech—specifically, written noncurricular materials that students desire to distribute—can be accommodated in a school setting.

Quite simply, the policy whose facial validity is at issue in this case does not prohibit *any* speech, except that falling into narrowly defined categories that the Court has already recognized as lacking First Amendment protection in a school setting. Those categories include speech that is obscene, speech promoting illegal drug use, and—invoking the very *Tinker* standard that petitioners urge as the only

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[5] Petitioners presumably mean all non-oral, rather than all non-verbal, speech.

First Amendment standard applicable in schools—speech that could result in material and substantial disruption. Pet. App. 101-102. Unquestionably, schools can prohibit speech falling into such categories, *e.g.*, *Morse*, 551 U.S., at 408-410; *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 682-683 (1986), and petitioners do not challenge any of those content-specific prohibitions in Plano ISD's policy. Their challenge is only to the policy's regulation of the times, places, and manners in which *permitted* speech may occur.

Like the statute regulating leafleting and displaying signs near a medical facility that was upheld in *Hill* v. *Colorado*, 530 U.S. 703, 720 (2000), Plano ISD's distribution policy "is not a 'regulation of speech.' Rather, it is a regulation of the places where" and times when "some speech may occur." *Id.*, at 719. To the extent petitioners try to give the impression that Plano ISD's policy prohibits religious speech, they are conflating their as-applied claims—which the district vigorously disputes and have not been adjudicated by any court[6]—with the facial challenge that was before the Fifth Circuit. Nowhere on its face does the policy prohibit any speech on the basis that it is religious. See Pet. App. 98-105. Nor can petitioners' insinuations about religious bias be squared with their own concessions that the policy is facially content- and viewpoint-neutral.

Plano ISD's policy balances the synergistic goals of preserving instructional time and protecting free speech rights by providing ample opportunities for

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[6] Although this case has now been pending for well over five years, no discovery has been conducted relating to any of petitioners' as-applied claims.

students to distribute any materials they desire, as long as they fall outside the narrow categories of unprotected speech. Middle and high school students are free to distribute any (protected) materials they desire almost anywhere and almost anytime before, during, and after school, except in classrooms during the school day. Plano elementary students have almost the same level of freedom, with only two additional restrictions. Because of special considerations in the elementary-school context, elementary students may not distribute materials in the hallways during school hours or in the cafeteria during designated meal periods. But those students can distribute materials at recess, before and after school, and at three annual parties. In addition to the ample opportunities to hand out materials throughout much of the school campus before, during, and after the school day, students at all grade levels may place materials on one or more designated distribution tables at each school, where the materials are available to interested individuals at all times.

The Fifth Circuit had a well-trodden jurisprudential path to follow in upholding those time, place, and manner regulations. "[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron*, 452 U.S., at 647. Rather, activities "protected by the First Amendment[] are subject to reasonable time, place, and manner restrictions." *Ibid.*; see also, *e.g.*, *Cox* v. *Louisiana*, 379 U.S. 536, 554 (1965).

Certain spheres "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly,

communicating thoughts between citizens, and discussing public questions." *Hague* v. *Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (opinion of ROBERTS, J.). Public streets and parks are the archetypal traditional public forums, and in such places the First Amendment guarantee of the freedom of speech is at its zenith. See *id.*, at 515-516.

In those traditional public forums, citizens have broadly protected rights to express themselves—whether by spoken word, expressive conduct, displaying signs, or distributing written materials—but even in such forums the right to express oneself "is not absolute, but relative." *Id.*, at 516; accord, *e.g.*, *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989); *Perry Educ. Assn.* v. *Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983). For example, an individual on a public street within 100 feet of a medical facility may be prohibited from "knowingly approach[ing]" within eight feet of another person without consent "for the purpose of leafletting or displaying signs" or "'engaging in oral protest, education, or counseling.'" *Hill*, 530 U.S., at 720. And persons may be prohibited from sleeping in a public park, even when the sleeping is intended as expressive conduct. *Clark* v. *Cmty. for Creative Non-Violence*, 468 U.S. 288, 298 (1984).

It is "[t]he nature of a place, 'the pattern of its normal activities [that] dictate the kinds of regulations of time, place, and manner that are reasonable.'" *Grayned* v. *City of Rockford*, 408 U.S. 104, 116 (1972). Government can prohibit solicitation on a sidewalk adjacent to a post office, *United States* v. *Kokinda*, 497 U.S. 720, 731 (1990) (plurality opinion), and in airport terminals, *Int'l Soc. for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 684 (1992).

A state fair can confine literature distribution to booths. *Heffron*, 452 U.S., at 654. Leafleting can be regulated on military bases, *Greer* v. *Spock*, 424 U.S. 828, 838 (1976), and in teachers' intraschool mailboxes, *Perry Educ. Assn.*, 460 U.S., at 56.

Tinker does not change those fundamental principles of First Amendment law in their application to a school context. *Tinker* "nowhere suggested that students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for his unlimited expressive purposes." *Grayned*, 408 U.S., at 117-118. But petitioners suggest that *Tinker* transforms schools not merely into a public forum but a super-public forum, in which time, place, and manner limitations are facially invalid. Under petitioners' view, while an adult on a public sidewalk near a medical facility may constitutionally be prohibited from knowingly approaching within eight feet of another adult to distribute a leaflet, a child in a classroom must be permitted to thrust the same leaflet at another child absent a showing that such conduct would cause a substantial and material disruption. Petitioners seek a constitutional standard under which students have an unfettered constitutional right to pass love notes or talk out of turn in the classroom, unless those activities cause a disturbance going far beyond interrupting a classroom lesson. See, *e.g.*, R.2790 (petitioners arguing that, under their proposed application of *Tinker*, "[e]ven 'disturbing class' [does] not rise to the level of materiel [*sic*] and substantial disruption where the exercise of such rights in . . . classrooms do [*sic*] not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school").

Petitioners' argument relies on a false dichotomy between what they perceive as the rule established by *Tinker* and a standard laid down in *United States* v. *O'Brien*, 391 U.S. 367 (1968) (upholding a prohibition on destruction of draft cards, even when done with expressive purpose), and similar cases. *Tinker* is not, as petitioners assert, distinguished from cases like *O'Brien* that uphold reasonable restrictions on free expression because *Tinker* deals with "pure speech" while the other cases deal with expressive conduct. *Tinker* itself involved expressive conduct—the silent wearing of plain black armbands. 393 U.S., at 504. As with burning a draft card, sleeping in a public park, or wearing nonuniform school clothes, it was only the expressive content of the wordless conduct that brought First Amendment considerations into play. See *id.*, at 506; cf. *Clark*, 468 U.S., at 298-299 ("No one contends that aside from its impact on speech a rule against camping or overnight sleeping in public parks is beyond the constitutional power of the Government to enforce."). The relevant distinction is not in the form of the expression but in the form and scope of the regulations at issue. *Tinker* involved an absolute ban on wearing armbands, imposed because officials disapproved of the viewpoint the wearers intended to express. It was not the prohibiting of armbands or other apparel items in general, but "the prohibition of expression of one particular opinion . . . without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline" that was "not constitutionally permissible." *Id.*, at 511.

Tinker remains the rule for testing the validity of a viewpoint-based absolute prohibition on particular expression in public schools. And if there is any question whether *Tinker* applies to *prohibitions* of

particular forms of expression that are *not* viewpoint based, this is not the case in which to answer that question. The facial challenge presented by this case involves no prohibition of protected speech. Plano ISD's policy affirmatively permits and provides opportunities for students to distribute their materials at school; it merely prevents them from, say, interrupting math class to do so. The Court has long made very clear that "laws regulating the time, place, or manner of speech stand on a different footing from laws prohibiting speech altogether." *Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85, 93 (1977).

B. No Circuit Has Applied *Tinker* to Content-Neutral Time, Place, and Manner Regulation of Student Distribution of Materials.

It is easy to understand why petitioners insist on mischaracterizing Plano ISD's policy as a prohibition of particular speech: they cannot even pretend there is a conflict among the circuits without doing so. Petitioners do not cite a single case in which a federal court of appeals applied *Tinker* to evaluate the constitutionality of a school policy governing when, where, or how students can distribute noncurricular materials, or to any policy of the sort. Instead, petitioners cite one case from the Sixth Circuit that upheld a school's distribution policy against an as-applied challenge under the same standard applied by the Fifth Circuit in this case and a few cases that involved prohibitions of specific speech. There is simply no split among the circuits.

Petitioners identify no case from any circuit adopting *Tinker* as the standard for determining the validity of a content-neutral regulation of when,

where, and how some speech may occur in a public school. Every case petitioners cite from the Second, Third, Fourth, and Eighth Circuits—the circuits purportedly on the *Tinker* side of petitioners' imagined split—involved a content-based prohibition of particular speech, not a content-neutral time, place, and manner regulation. *Lowry* v. *Watson Chapel Sch. Dist.*, 540 F.3d 752, 758-759 (CA8 2008) (students prohibited from wearing armbands because armbands signified disagreement with school uniform policy)[7]; *Guiles* v. *Marineau*, 461 F.3d 320, 321 (CA2 2006) (student prohibited from displaying alcohol- and drug-related images on T-shirt); *Newsom* v. *Albemarle County Sch. Board*, 354 F.3d 249, 252-254 (CA4 2003) (student prohibited from displaying images of weapons on T-shirt); *Walker-Serrano* v. *Leonard*, 325 F.3d 412, 414 (CA3 2003) (third grader allegedly prohibited from circulating a petition); *Saxe* v. *State Coll. Area Sch. Dist.*, 240 F.3d 200, 202-204 (CA3 2001) (policy forbidding a broad array of purportedly harassing speech that "prohibit[ed] a substantial amount of speech that would not constitute actionable harassment under either federal or state law"). And of those, only *Saxe* presented a pure facial challenge.

Petitioners' purported "hybrid approach," Pet. 20, case from the Seventh Circuit—*Nuxoll* v. *Indian Prairie School District No. 204*, 523 F.3d 668 (CA7 2008)—also involved a content- and viewpoint-based prohibition of particular speech. A student had been prohibited from making negative comments about

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[7] *Lowry* also involved a student's being disciplined for distributing a flyer without prior approval, 540 F.3d, at 756, but the Eighth Circuit's First Amendment analysis addressed only the ban on armbands, *id.*, at 759-761.

homosexuality. *Id.*, at 669. Whether or not *Nuxoll*'s approach was a "hybrid," it is irrelevant because *Nuxoll* did not involve the same question the Fifth Circuit addressed in this case. Nor did *Walker-Serrano* apply *Tinker* to a school's distribution policy, despite petitioners' parenthetical suggesting just that. See Pet. 17. *Walker-Serrano* considered the alleged suppression of a particular petition, not the constitutionality of the school's distribution policy. 325 F.3d, at 418.

The only case identified by petitioners, other than this one, that actually involved the constitutionality of a content-neutral policy regulating when, where, and how students could distribute noncurricular materials is *M.A.L.* v. *Kinsland*, 543 F.3d 841 (CA6 2008). And *M.A.L.*, as petitioners correctly note, took an approach identical to that taken by the Fifth Circuit in this case, upholding—against an as-applied challenge—a distribution policy that was more restrictive than Plano ISD's. *Id.*, at 850-851. There can be no split when the only other circuit considering similar issues has applied the same approach and reached the same conclusion as the Fifth Circuit in this case.

Of the other cases that petitioners identify as being on the Fifth Circuit's side (*i.e.*, the only side) of their imagined split, *Porter* v. *Ascension Parish Sch. Board*, 393 F.3d 608 (CA5 2004), involved "unique facts," *id.*, at 621, and an analysis inapposite to any issue presented in this case. The Fifth Circuit, invoking both *Tinker* and its own holding in *Canady* v. *Bossier Parish School Board*, 240 F.3d 437 (CA5 2001), found that a student could not be disciplined over a violent drawing that, it was undisputed, he had never intended to communicate to anyone on school grounds. *Porter*, 393 F.3d, at 615, 621.

Petitioners' remaining cases involved school dress code or uniform policies, not materials-distribution policies. *Palmer* v. *Waxahachie Indep. Sch. Dist.*, 579 F.3d 502, 506 (CA5 2009), *cert. denied*, 130 S.Ct. 1055 (2010); *Jacobs* v. *Clark County Sch. Dist.*, 526 F.3d 419, 422 (CA9 2008); *Blau* v. *Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 385 (CA6 2005); *Canady*, 240 F.3d, at 438. Like this case and *M.A.L.*, the dress code cases are distinguishable from petitioners' cases applying *Tinker* because they involved content-neutral policies that did not seek to prohibit particular speech because of the content it contained or the viewpoint it expressed. Compare *Palmer*, 579 F.3d, at 510; *Jacobs*, 526 F.3d, at 434; *Blau*, 401 F.3d, at 391; *Canady*, 240 F.3d, at 442, with, *e.g.*, *Guiles*, 461 F.3d, at 321 (alcohol- and drug-related images specifically prohibited); *Newsom*, 354 F.3d, at 252-254 (same for images of weapons). Thus every circuit that has considered a generalized school apparel policy—as opposed to a targeted ban of specific expressive adornments, messages, or images—has treated it as imposing "time, place, manner restrictions" subject to intermediate scrutiny under a consistently applied standard. *Palmer*, 579 F.3d, at 508 & nn.3, 7.[8]

The Court has already this Term denied review of a school dress code case brought by counsel for petitioners in this case. *Palmer*, 130 S.Ct., at 1055. To the extent a content-neutral school apparel policy is analogous to the time, place, and manner

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[8] In an unreported, *per curiam* opinion, the Eleventh Circuit applied the same standard to uphold a school board's limitation on students' wearing pierced jewelry. *Bar-Navon* v. *Brevard County Sch. Board*, 290 Fed. Appx. 273, 276-277 (CA11 2008) (*per curiam*) (unpublished).

limitations imposed on student distribution of noncurricular written materials under Plano ISD's policy, all the cases line up on the same side. To the extent dress codes or uniform requirements present different questions—for example, whether even a content-neutral prohibition of printed messages on T-shirts warrants a higher level of scrutiny than intermediate—this case could not be the case in which to address them. Plano ISD's policy permits all constitutionally protected written materials to be distributed on its school campuses, at appropriate times and places.

II. THIS CASE IS A POOR VEHICLE FOR ADDRESSING THE QUESTION PRESENTED.

Because there is no conflict among the courts of appeals and because the Fifth Circuit's ruling is both correct and consistent with this Court's prior decisions, review of this case is unwarranted, just as it was unwarranted in *Palmer*, in which counsel for petitioners attempted to present substantially the same question regarding the application of *Tinker*. See Pet. for Writ of Cert. at i, *Palmer* v. *Waxahachie Indep. Sch. Dist.*, No. 09-409 (2009). But review is also unwarranted because this case is a poor vehicle for reviewing the question presented, particularly at this interlocutory stage of the case in which only the facial challenge to the 2005 policy has been addressed. Respondents' as-applied challenges and claims lodged against the remaining individual defendants are still outstanding and unresolved.[9] As

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[9] In addition to Plano ISD, individual defendants Lynn Swanson, Lisa Long, Suzie Snyder, and Jackie Bomchill remain as parties to the underlying suit, with unresolved claims against them.

the Fifth Circuit noted in its opinion, "regardless of [the court's] disposition of this matter, [petitioners] will continue to litigate the constitutionality of the District's rules." Pet. App. 4, n.5.

This case is particularly unsuitable for review because of its interlocutory posture. Petitioners raised both facial and as-applied challenges. The Fifth Circuit, however, has addressed only the facial challenge to the 2005 policy. Pet. App. 13-14. The facial challenge to the 2004 policy and the as-applied challenges remain pending before the district court. *Ibid.* Additionally, a separate appeal regarding qualified immunity remains pending before the Fifth Circuit. See *Morgan* v. *Swanson*, No. 09-40373 (CA5, oral argument heard Apr. 7, 2010). In other words, the case in its current posture presents the court with only one of a number of live issues, while challenges to the facial constitutionality of the 2004 policy, as-applied challenges, issues of qualified immunity, and various claims asserted against individual defendants all remain unresolved.

The interlocutory nature of the court of appeals's judgment "alone furnishe[s] sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see also *Bhd. of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (*per curiam*) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court. The petition for a writ of certiorari is denied."); *American Constr. Co.* v. *Jacksonville, T. & K. W. R. Co.*, 148 U.S. 372, 384 (1893) (stating that the Court generally will not review interlocutory orders absent "extraordinary" circumstances); *Virginia Military*

Inst. v. *United States*, 508 U.S. 946, 946 (1993) (opinion of SCALIA, J., respecting denial of petition for writ of certiorari) (stating that the Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction").

Even the Fifth Circuit acknowledged the procedural posture of this case as "perverse in execution." Pet. App. 4, n.5. The Fifth Circuit explained, in addressing the district court's certification under Federal Rule of Civil Procedure 54(b) of its judgment on the claims of facial unconstitutionality, that "we remain *dubitante* over the efficiency of separating the claims into separate appeals, an effort further complicated by the later denial of qualified immunity to individual defendants." Pet. App. 4, n.5 (emphasis added). Petitioners cannot seriously suggest that granting review at this time will conserve resources in litigating the claims that remain pending in the district court and the Fifth Circuit.[10]

More fundamentally, that the Court's review at this stage might serve petitioners' convenience does not make the case a proper vehicle for resolving the constitutional question. While petitioners stridently (and incorrectly) suggest that the Fifth Circuit's decision "will affect the First Amendment rights of millions of students," Pet. 31, this fact, if true, would only further justify denial of the petition because the relevant factual record is incomplete and because it is

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[10] Petitioners' suggestion that the district court "recognized the importance" of the issue when it certified the judgment under rule 54(b) is unsupported by the record. Pet. 2. The district court's certification order never even suggests that its decision was based on the importance of the issue presented. R.3764-3766.

this Court's well-established practice to avoid deciding facial challenges while as-applied challenges remain pending.

The incomplete factual record alone justifies denial of the petition. Petitioners' question presented characterizes the 2005 policy as viewpoint neutral. Pet. i. But petitioners repeatedly suggest in their petition that respondent has, in fact, applied the policy in a viewpoint-based manner. See, *e.g.*, Pet. 4, 33; see also R.1530-1670. And petitioners also suggest that the standard of review applied to viewpoint-neutral policies should be based, in part, on the danger that they will be applied in viewpoint-based ways. See, *e.g.*, Pet. 14, 32. Indeed, although it is only the facial challenge that was before the Fifth Circuit and that petitioners seek to place before this Court, petitioners cannot refrain from discussing their (meritless, not-yet-adjudicated) as-applied claims at every turn. The record on appeal, however, is not yet developed regarding how the policies were applied because the as-applied claims remain pending before the district court and have not been heard by the Fifth Circuit. If the issue presented in this case is as important as petitioners incorrectly suggest, the Court should not address these constitutional issues on an incomplete record regarding factual issues that may be relevant to the constitutional analysis.

Finally, the Court should not grant review of the claim facially challenging the constitutionality of the 2005 policy while the as-applied challenge remains pending in the district court. *Renne* v. *Geary*, 501 U.S. 312, 323-324 (1991) (facial challenge should generally not be entertained when an "as-applied" challenge could resolve the case); *United States* v. *Raines*, 362 U.S. 17, 20-22 (1960) (describing the

Court's preference for as-applied rather than facial challenges). As the Court recently explained, "[f]acial challenges are disfavored for several reasons" including because they "run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 450 (2008) (internal quotation marks omitted); see also *Gonzales* v. *Carhart*, 550 U.S. 124, 168 (2007) (noting that "[a]s-applied challenges are the basic building blocks of constitutional adjudication").

CONCLUSION

For these reasons, the Court should deny the petition.

Respectfully submitted,

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